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In The

Supreme Court of the United States

October Term, 1997

GERALD R. CARON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When (1) a person with a state felony conviction receives a pardon or has civil rights restored, (2) the pardon or state law reinstates some, but not all, of the person's firearms privileges, and (3) the person then possesses a permitted firearm and is prosecuted as a "felon in possession" under 18 U.S.C. § 922(g), is it the case that the "pardon . . . or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms" (18 U.S.C. § 921(a)(20)) and that the person therefore falls outside the pardon/civil-rights'-restoration exemption from the felon-in-possession law and the Armed Career Criminal Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTES 2

STATEMENT 3

SUMMARY OF ARGUMENT 10

ARGUMENT 11

I. THE "ALL OR NOTHING" READING OF THE "EXPRESSLY PROVIDES" CLAUSE OF THE 18 U.S.C. § 921(a)(20) PARDON/RIGHTS'-RESTORATION EXEMPTION IS CONTRARY TO THE PLAIN MEANING OF THE CLAUSE'S WORDS 11

II. THE "ALL OR NOTHING" READING IS INCOMPATIBLE WITH CONGRESS'S MAIN GOAL IN ADOPTING THE PARDON/RIGHTS'-RESTORATION EXEMPTION AND ITS OTHER 1986 AMENDMENTS TO 18 U.S.C. § 921(a)(20): DEFERENCE TO STATE INTERESTS 18

III. READING THE "EXPRESSLY PROVIDES" CLAUSE AS PERMITTING PARTIAL REINSTATEMENT OF FELONS' FIREARMS PRIVILEGES MAKES BETTER SENSE OF THE STATUTORY SCHEME 23

a. Avoiding Unfairness to the Felon who Relies Upon the Terms of a Pardon or Upon State Law 23

TABLE OF CONTENTS – Continued

Page

b. Avoiding the Irrationality of States' Having to Give Rights'-Restored Felons Access to the Most Dangerous Legal Firearms in Order to Allow Access to the Least Dangerous 25

c. Ease of Administration 26

d. The Invalidity of the Trustworthiness Rationale 27

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Beecham v. United States, 511 U.S. 368 (1994) 9

Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983) 19, 20

Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974) 20

United States v. Bass, 404 U.S. 336 (1971) 18, 22

United States v. Caron, 941 F.Supp. 238 (1996) 6, 7

United States v. Caron, 64 F.3d 713 (1st Cir. 1995) 1, 3, 5, 25

United States v. Caron, 77 F.3d 1 (1st Cir.) (en banc), *cert. denied*, 116 S.Ct. 2569 (1996) 1, 6

United States v. Cassidy, 899 F.2d 543 (6th Cir. 1990) 12, 19

United States v. Dahms, 938 F.2d 131 (9th Cir. 1991) 13, 30

United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992), *cert. denied*, 506 U.S. 1083 (1993) 13, 27, 28, 29

United States v. Estrella, 104 F.3d 3 (1st Cir. 1997), *cert. denied*, 117 S.Ct. 2494 (1997) ..... *passim*

United States v. Gradwell, 243 U.S. 476 (1917) 17

United States v. Granderson, 511 U.S. 39 (1994) 18

United States v. Indelicato, 97 F.3d 627 (1st Cir. 1996) 21, 28

United States v. Lacher, 134 U.S. 624 (1890) 17

United States v. McLean, 904 F.2d 216 (4th Cir.), *cert. denied*, 498 U.S. 875 (1990) 19

TABLE OF AUTHORITIES – Continued

Page

United States v. Qualls, 108 F.3d 1019, *order granting rehearing en banc*, 122 F.3d 38 (9th Cir. 1997) 13

United States v. Ramos, 961 F.2d 1003 (1st Cir.), *cert. denied*, 506 U.S. 934 (1992) 5, 6

United States v. Shoemaker, 2 F.3d 53 (4th Cir. 1993) 13

United States v. Sullivan, 98 F.3d 686 (1st Cir. 1996) 12

United States v. Wind, 986 F.2d 1248 (8th Cir. 1993) 13

STATUTES, SENTENCING GUIDELINES, AND RULE

18 U.S.C. § 921(a)(20) ..... *passim*

18 U.S.C. § 921(a)(20) (1985) 18-19

18 U.S.C. § 922(g) 2, 24

18 U.S.C. § 922(g) (1985) 20

18 U.S.C. § 922(g)(1) 4

18 U.S.C. § 922(h) (1985) 20

18 U.S.C. § 924(a)(2) 7

18 U.S.C. § 924(e) 4

18 U.S.C. § 924(e)(1) 3

18 U.S.C. App. § 1201-1203 (1985) 20, 21

28 U.S.C. § 1254(1) 1

Fed. R. Evid. 609(e) 30

Firearms Owners' Protection Act, Pub.L. No. 99-308, 100 Stat. 449 18

Mass. Gen. L. ch. 140, § 129B 7, 24

TABLE OF AUTHORITIES – Continued

Page

Mass. Gen. L. ch. 140, § 131 7

Mass. Gen. L. ch. 127, § 133 30

Mass. Gen. L. ch. 279, § 24 30

Sentencing Guidelines:

§ 4A1.2(e) 7

§ 4B1.4 5

§ 4B1.4(b)(3) 5

§ 4B1.4(c)(2) 5

§ 5A – Sentencing Table 5

MISCELLANEOUS

Civil Disabilities of Convicted Felons, A State-by-State Survey (Department of Justice loose-leaf book, October 1996) 30

Kathleen M. Olivares, Velmer S. Burton, Jr. & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60-SEP Fed. Probation 10 (1996) 29

H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, Benchmarks, 196 (1967) 18

S. 1030, 97th Cong., 1st Sess. (1981) 22

S.Rep. 476, 97th Cong., 2d Sess. (1982) 23

S.Rep. 583, 98th Cong., 2d Sess. (1984) 23

Sutherland Statutory Construction § 45.12 (5th ed. 1992) 26

OPINIONS BELOW

The Order of Court (May 9, 1997) of the court of appeals (J.A. 52-54) is unpublished. The opinion of the district court (J.A. 9-51) is reported at 941 F.Supp. 238. An opinion of the court of appeals in the same case on an earlier appeal is reported at 64 F.3d 713 (1st Cir. 1995) and an en banc opinion on that appeal is reported at 77 F.3d 1 (1st Cir. 1996).

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Judgment below was by way of the Order of Court of May 9, 1997. While petitioner's request for rehearing en banc was pending in the circuit court, Justice Souter on August 7, 1997 extended until October 6, 1997 the time for petitioner to file for certiorari. By order of August 11, 1997, the court of appeals denied en banc rehearing; the order also stated that petitioner's petition for rehearing was denied, though petitioner had filed no request for (panel) rehearing. The petition for certiorari was timely filed October 6, 1997 under Rule 29.2. In addition, the petition was timely filed because filed within 90 days of denial of rehearing, given that the court of appeals treated the request for en banc hearing as a request for rehearing. Rule 13.3. This Court granted certiorari and petitioner's motion to proceed *in forma pauperis* on January 9, 1998.

RELEVANT STATUTES

1. Section 921(a)(20) of Title 18 of the United States Code says:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include –
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. Section 922(g) of Title 18 of the United States Code says in pertinent part:

> It shall be unlawful for any person –
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year,
>
> . . .

> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. Section 924(e)(1) of Title 18 of the United States Code says:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT

On July 14, 1993, Fall River, Massachusetts police, responding to a telephone call, arrested petitioner, Gerald R. Caron (referred to here sometimes as "defendant"), on various state charges. At the time of his arrest, he was holding a loaded .22 caliber Ruger semiautomatic rifle. *United States v. Caron, supra*, 64 F.3d at 714. Some months later, on December 1, 1993, law enforcement agents executed a federal search warrant at defendant's home in the adjoining town of Westport, Massachusetts and seized four rifles, two shotguns, and over 6,800 rounds of

ammunition. *Id.* Defendant had a criminal record, some specifics of which are stated below.

On February 10, 1994, a grand jury in the District of Massachusetts charged defendant with violating – or, in the case of the first count, with conspiring to violate – 18 U.S.C. § 922(g)(1), the "felon in possession" law, quoted above. The indictment charged that defendant, having been convicted of (an unspecified) crime punishable by imprisonment for a term exceeding one year, possessed in or affecting commerce: on or about July 14, 1993 in Fall River the Ruger .22 rifle (Count Two) and .22 ammunition (Count Three) and on or about December 1, 1993 in Westport the two shotguns and four rifles (Count Four) and 6,823 rounds of ammunition (Count Five). J.A. 4-8. Count One, the conspiracy count, was dismissed before trial.

Defendant was convicted by a jury in a two-day trial in July 1994.

At sentencing on September 19, 1994, the district court, over defendant's objection, found that defendant had four prior convictions meeting the definition of "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). (The ACCA, quoted in part above, requires a minimum 15-year prison sentence for a "felon in possession" with three or more prior convictions for violent felony or serious drug offense.) The convictions in question were three old Massachusetts convictions for breaking and entering or attempted breaking and entering dating from 1958, 1959, and 1963 and a 1970 California conviction for assault with intent to murder and attempted murder. Presentence Report,

August 31, 1994, paras. 57, 59, 62, 73, 92, and p. 3 of the (September 15, 1994) Addendum to the Presentence Report. Defendant's objection was that the three Massachusetts convictions did not meet the definition of "crime punishable by imprisonment for a term exceeding one year" in that they fell within 18 U.S.C. § 921(a)(20)'s exemption for convictions for which a person has had civil rights restored. In rejecting defendant's contention, the district court followed *United States v. Ramos*, 961 F.2d 1003 (1st Cir.), *cert. denied*, 506 U.S. 934 (1992), which had held that the civil rights' restoration exception applies only when rights are restored on an individualized, case-by-case basis. (No such individualized restoration had taken place for defendant's convictions.)

The court then applied the ACCA sentencing guideline, U.S.S.G. § 4B1.4. It found that defendant's July 14, 1993 offenses (Counts Two and Three) were in connection with a crime of violence and, accordingly, arrived at an offense level of 34 and a Criminal History Category VI. *See* U.S.S.G. §§ 4B1.4(b)(3) and 4B1.4(c)(2) (raising, respectively, the usual ACCA offense level of 33 to 34 and the usual ACCA Criminal History Category of IV to VI if the firearm possession was in connection with a crime of violence). The guideline sentencing range for level 34, Category VI is 262-327 months (U.S.S.G. ch. 5, part A – Sentencing Table). The court sentenced defendant to the low point of the range, *i.e.*, to a prison sentence of 262 months (21 years, 10 months) together with a term of supervised release and a $200 special assessment.

Defendant's conviction and sentence were affirmed on appeal. *United States v. Caron*, 64 F.3d 713, *supra*. On

rehearing en banc, however, the court of appeals overruled its *Ramos* case and remanded the case for reconsideration of whether the rights'-restoration exemption applied to the three Massachusetts convictions. *United States v. Caron*, 77 F.3d 1, *supra*. Specifically, the district court was to consider whether Massachusetts had sufficiently restored defendant's civil right to sit on a jury and – the issue now before this Court – whether the exemption's "expressly provides" clause defeated defendant's argument that his civil rights had been restored. *Id.* at 6. (The court noted general agreement that "civil rights" under § 921(a)(20) comprise the rights to vote, to seek and hold public office, and to serve on a jury. *Id.* at 2. It found that, because Massachusetts never abrogates a felon's right to vote and because it restores upon release from imprisonment the right to seek and hold office, defendant's civil rights would be restored if his right to serve on a jury had been restored. *Id.* at 5-6.)

(This Court on June 24, 1996 denied certiorari with respect to other issues defendant had raised on appeal. 116 S.Ct. 2569.)

On remand, the district court, after hearings, ruled in a Memorandum and Order issued September 12, 1996 that (1) Massachusetts law restores to felons, seven years after conviction or release from imprisonment, the civil right to serve on a jury and that defendant's civil rights had thus been restored with respect to his three Massachusetts convictions and (2) that Massachusetts had not "expressly provide[d] that [defendant might] not ship, transport, possess, or receive firearms." J.A. 9-51; 941 F.Supp. 238. Accordingly, as defendant had only one remaining ACCA predicate – the 1970 assault/attempted-

murder conviction – the district court found him ineligible for ACCA sentencing.

In making its finding that the "expressly provides" clause did not apply to the three convictions, the district court explained that Massachusetts law reinstates, five years after conviction or release from any resulting sentence, a convicted felon's right to have rifles and (long-barreled) shotguns as well as to have handguns at one's residence or business. J.A. 31-41, 941 F.Supp. at 248-252. Mass. Gen. L. ch. 140, § 129B. The court noted that Massachusetts law prevents a convicted felon from ever receiving a license to carry handguns. J.A. 37, 941 F.Supp. at 250. Mass. Gen. L. ch. 140, § 131. As defendant's case involved rifles and shotguns, the court rejected the government's argument that the "expressly provides" clause was "all or nothing," *i.e.*, that the lifetime ban on defendant's carrying handguns made the rights'-restoration exemption altogether inapplicable. J.A. 44-47, 941 F.Supp. at 253-4.

Defendant was resentenced on October 15, 1996. The court found defendant's offense level to be 20, his Criminal History Category to be II, and his guideline sentencing range to be 37-46 months. (The Criminal History Category was only II because the Sentencing Guidelines, unlike the ACCA, set cut-off dates for counting convictions, *see* U.S.S.G. § 4A1.2(e), and defendant's only conviction recent enough to count was a federal conviction on which he was released in 1981. Presentence Report, para. 76.) Over defendant's objection, the district court departed upwards to the 10 year maximum prison sentence for ordinary, non-ACCA felon-in-possession offenses. *See* 18 U.S.C. § 924(a)(2). Accordingly, defendant

was sentenced to 10 years' imprisonment, a term of supervised release, and a special assessment.

Both parties appealed. The government appealed from the district court's finding that defendant's three breaking and entering convictions were, by reason of civil rights' restoration, exempt from the ACCA consideration (No. 96-2339). Defendant appealed from the court's upward departure (No. 96-2338).

While the appeal was still in early stage, the First Circuit decided *United States v. Estrella*, 104 F.3d 3 (January 9, 1997), *cert. denied*, 117 S.Ct. 2494 (1997), a case that decided both civil-rights'-restoration issues on which the district court had ruled in this, Caron's, case. (Because the circuit court's later decision in this case was controlled by *Estrella*, the parties have agreed to include *Estrella* in the Joint Appendix. J.A. 57-70.)

At issue in *Estrella*, a felon-in-possession case from the District of New Hampshire, was a Massachusetts conviction on which Estrella had been released from prison more than seven years before the federal offense. Estrella made the same argument as Caron: that his prior conviction was not a "crime punishable by imprisonment for a term exceeding one year" because Massachusetts had restored his civil rights. In *Estrella*, the circuit court first held that Massachusetts had restored Estrella's civil rights. In particular, it decided the main open question on whether Massachusetts restores § 921(a)(20) civil rights, holding – in agreement with the district court in Caron's case – that the right to serve on a jury is restored seven years after release from any imprisonment imposed on a conviction. J.A. 60-64, 104 F.3d at 6-7. (Even though

Estrella lived in New Hampshire and the firearm was found in his garage, § 921(a)(20) civil-rights'-restoration takes place, if at all, only in the jurisdiction that imposed the conviction. *Beecham v. United States*, 511 U.S. 368 (1994).) But, *Estrella* then held, in *disagreement* with the district court in Caron's case, that though Massachusetts felons in time become eligible to have rifles and shotguns – and even, in limited circumstances, handguns – Massachusetts, in forever barring felons from carrying handguns, had "expressly provide[d] that [Estrella might] not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20).

Relying on *Estrella*, the circuit court on May 9, 1997 issued the order that disposed of Caron's appeal and as to which this Court has now granted certiorari. J.A. 52-54. The order vacated the district court's judgment, ordered defendant resentenced under the ACCA, and dismissed as moot defendant's appeal of the district court's upward departure. J.A. 54. In particular, the order said:

> After the district court resentenced Caron, this court decided *United States v. Estrella*, 104 F.3d 3 (1st Cir. 1997). In *Estrella*, we adopted an "all or nothing" approach under which a conviction counts within the meaning of § 920(a)(20) if the state continues in any way to restrict significantly the ex-felon's right to ship, transport, possess, or receive firearms. *Estrella*, 104 F.3d at 8. We also held that "Massachusetts' ban on handgun possession by ex-felons outside the home or business is a substantial enough limit on firearms rights to preserve the federal ban." *Id.*

J.A. 53.

As already stated, defendant's request for en banc hearing was in due course denied (Norman H. Stahl, J., dissenting) and this Court granted certiorari on January 9, 1998.

SUMMARY OF ARGUMENT

The exemption in 18 U.S.C. § 921(a)(20) from the reach of federal firearms law for convictions as to which there has been pardon, civil rights' restoration, expungement, or set-aside does not become inapplicable if the pardon or state law allows access to only some, and not all, firearms, for these reasons:

If a person receives a pardon or a restoration of rights that allows possession of some firearms but not others, it cannot, as a matter of simple English, be said that the pardon or restoration of rights provides that the person may not possess firearms. To say that a person may not have firearms is to say that the person may not have *any* firearms; it is not, as proponents of the "all or nothing" view apparently claim, to say that there are firearms that the person may not have. The rule of lenity, moreover, requires that the "all or nothing" view be rejected if the words of the statute are unclear on the issue.

The "all or nothing" reading is incompatible with Congress's main goal in enacting the pardon/civil-rights'-restoration exemption and other changes to the preexisting 18 U.S.C § 921(a)(20): to defer to state interests.

Reading the § 921(a)(20) exemption to honor partial reinstatement of firearms privileges makes the most sense. It avoids the unfairness to a pardoned or rights'-restored felon who innocently relies on the pardon or state law and possesses a firearm that the pardon or state law allows him to possess. It avoids the irrationality of a state's being able to give felons access to the least dangerous firearms only if it gives them access to the most dangerous. It avoids the administrative problem of having federal courts find and evaluate state law restricting firearms not in issue in the case. The "trustworthiness" rationale, the policy ground cited by cases adopting "all or nothing" to support their reading, is fatally flawed because the § 921(a)(20) exemption applies in a host of situations where a person with a felony conviction has not been deemed fully 'trustworthy.'

ARGUMENT

I. THE "ALL OR NOTHING" READING OF THE "EXPRESSLY PROVIDES" CLAUSE OF THE 18 U.S.C. § 921(a)(20) PARDON/RIGHTS'-RESTORATION EXEMPTION IS CONTRARY TO THE PLAIN MEANING OF THE CLAUSE'S WORDS

The phrase at issue here is the "expressly provides" clause in the third (and last) sentence of 18 U.S.C. § 921(a)(20). That sentence, again, is:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or

> restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

The issue in the case is whether, despite rights'-restoration and despite expiration of the five-year Massachusetts ban on felons' access to long-barreled guns, Caron's three Massachusetts convictions in question count as § 921(a)(20) convictions on the ground that Massachusetts, in imposing its ban on felons' carrying handguns, "expressly provides that [felons] may not ship, transport, possess, or receive firearms," *i.e.*, whether the "all or nothing" view of the clause is correct.

(For brevity, we refer in what follows to the "pardon/rights'-restoration exemption" as shorthand for the entire exemption, including expungements and set-asides, and at times refer to the "expressly provide" clause's prohibition on possession as shorthand for the full "ship, transport, possess, or receive" prohibition. We take it as a given that where civil rights are restored by operation of state law, rather than in a case-specific document, one looks to the whole of state law – not just the particular statutes that restore civil rights – to determine whether there is an express provision that the person may not possess firearms. *See United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990); *See also United States v. Sullivan*, 98 F.3d 686, 689 (1st Cir. 1996) (listing cases on the latter point.))

To say that a felony conviction as to which a felon has had rights restored does not count under the felon-in-possession law unless it is provided that he may not possess firearms is to say that the conviction does not count unless it is provided that he may not possess *all*

firearms. A proviso that a person may have specified types of firearms but not others is *not* a proviso that he may not have firearms.

To read, as some of the cases do,[1] the plain language of the statute as requiring the "all or nothing" view is to read the phrase "provides that the person may not . . . possess firearms" in an abnormal manner. If a homeless shelter were funded under a grant that required it to prohibit alcohol on the premises, adopting a house rule prohibiting hard liquor but allowing beer and wine would unquestionably violate the grant's terms. In normal parlance, a rule that prohibits some, but not all, alcohol is not a rule that prohibits alcohol.

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[1] The cases on the clause's meaning cover a wide range. Some say that the "all or nothing" reading is required by the plain language of § 921(a)(20). *United States v. Driscoll*, 970 F.2d 1472, 1481 (6th Cir. 1992), *cert. denied*, 506 U.S. 1083 (1993). Some say that the clause is ambiguous and apply the rule of lenity in the defendant's favor. *United States v. Dahms*, 938 F.2d 131 (9th Cir. 1991). One case, though it initially speaks of "ambiguity" in the statute, then takes it for granted, without resort to the rule of lenity, that a restoration of rights not prohibiting firearms possession at home did not "expressly provide that the [defendant might] not ship, transport, possess, or receive firearms" when the possession occurred in the defendant's home. *United States v. Shoemaker*, 2 F.3d 53 (4th Cir. 1993) ('ambiguity' being mentioned at 55). Another case assumes – and holds – without discussion that the rights'-restoration exemption applies if state law allows the firearm possession at issue but prevents access to some other firearms that non-felons may possess. *United States v. Wind*, 986 F.2d 1248 (8th Cir. 1993). The issue in this case was recently reheard by the Ninth Circuit. *United States v. Qualls*, 108 F.3d 1019, *order granting rehearing en banc*, 122 F.3d 38 (9th Cir. 1997) (reargued Nov. 20, 1997).

In the cases we have found on the issue, the claim for a conviction's exemption from federal firearms law has rested on restoration of civil rights. The invalidity of the "all or nothing" reading becomes even clearer if one considers the case of a pardon.

Assume that a person with an old felony conviction has since lived an exemplary life and would now like to go hunting. He presents the governor's pardon office with his grounds for pardon, and he explains that he hopes to regain rifle and shotgun privileges but that he has no interest in ever possessing handguns. (Suppose state law, absent a pardon, never allows a felon to have firearms of any type.) The governor, herself a believer in strict limits on handguns, deems a pardon appropriate. She grants a pardon that lets the person have *some* guns but not others; the pardon specifies that he "shall have full privileges with respect to *rifles* and *shotguns* but no *handgun* privileges." If the person now goes hunting with a rifle or shotgun affecting commerce, can he be prosecuted as a felon in possession?

Clearly not. As a matter of plain English, it is simply incorrect to say that the "pardon . . . expressly provides that the person may not ship, transport, possess, or receive firearms." If the person, after reading the statute, asked himself whether his pardon prohibited his possessing firearms, he would say, correctly, that it prohibited his having *some* firearms but that it certainly did not prohibit his having *firearms*. It is, we submit, *intuitively clear* to any English speaker that the pardon does not expressly provide that the person may not ship, transport, possess, or receive firearms. In short, the plain meaning of the statute's words, the meaning that the man or woman in the

street would take from them, flatly contradicts the "all or nothing" view.

The cases that derive the "all or nothing" meaning from the statute's plain language apparently assume that the literal meaning of the sentence "X may not . . . possess . . . firearms" is "There are firearms that X may not . . . possess. . . . " But as speakers of English, we know that the two sentences mean something quite different, just as we know that "Smoking is prohibited in federal buildings" is worlds apart from "Smoking is prohibited in some federal buildings." Because after Caron's civil rights were restored Massachusetts law provided that Caron was allowed to possess rifles and shotguns, it simply did not "expressly provide that he might not possess firearms."

The government might say that the words with which the pardon/rights'-restoration exemption begin – "Any conviction" – suggest that a given conviction either does or does not count for felon-in-possession/ACCA purposes and is not divisible according to what type of firearm the felon possesses and under what circumstances. A conviction, it may say, either *is* a "crime punishable by imprisonment for a term exceeding one year" or it is *not*; and something cannot jump from being a conviction to not being a conviction depending upon whether the convicted person at such and such a time and place is carrying, say, a pistol as opposed to a rifle.

This argument is invalid. Because the exemption is phrased in terms of when an *actual* conviction is to be *considered* a conviction for certain purposes, the exemption is premised on the notion that whether or not a

conviction counts for those purposes depends on the circumstances. Indeed, even proponents of the "all or nothing" reading have to concede that whether a conviction counts under § 921(a)(20) is circumstance-dependent. Suppose that a state restores civil rights upon release from custody and removes all firearms restrictions two years later. If the person was on parole for *four* years and is returned to custody in year 3 for parole violation, the original conviction, for a period of time not a "conviction" as defined in § 921(a)(20), returns to being a § 921(a)(20) conviction upon return to custody and until two years after the second release.

To make its rejection of "all or nothing" view even clearer, Congress *could* have said that convictions for which there has been expungement, a set-aside, pardon or rights-restoration do not count "*except to the extent that* the pardon, expungement, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms." By contrast, had it wanted to adopt the "all or nothing" view, Congress could have said that convictions for which there has been expungement, a set-aside, pardon or rights-restoration do not count "unless the pardon, expungement, or restoration of rights places any express limits on the person's firearms privileges." In fact, had it chosen "all or nothing," Congress could have worded the whole exemption more simply by saying something like:

> Any conviction which, without express limits on firearms privileges, has been expunged or set aside or for which a person has, without such limits, been pardoned or had civil rights restored shall not be considered a conviction for purposes of this chapter.

The government may argue that a completely literal reading of the exemption produces an absurd result. Inasmuch as the hypothetical pardon, in banning some but not all firearms, does not "expressly provide that the person may not . . . possess . . . firearms," the government may say that the literal meaning of the exemption is that the prior conviction "shall not be considered a conviction" even if the felon-in-possession case involves a *banned* firearm.

This argument is, in essence, a debater's point that lacks substance. As a matter of common sense, no one who juxtaposed such a case against the exemption's language would read it that way. The hypothetical pardoned person could not buy a handgun and then, when acting in direct defiance of the terms of the pardon, say with a straight face that he was exempt from the felon-in-possession law. What the argument tells us, if anything, is that Congress might have been more precise had it said, as suggested above, that convictions do not count as such except to the *extent* that the pardon or rights'-restoration bans firearms.

Insofar as the statute is thought to be unclear, "all or nothing" cannot prevail in any event. "[B]efore a man can be punished under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917), quoting *United States v. Lacher*, 134 U.S. 624, 628 (1890). As the Court said recently, the rule of lenity should be

applied where a criminal law's "text, structure, and history" "fail to establish that the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994). The rule embodies "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 209 (1967), quoted in *United States v. Bass*, 404 U.S. 336, 348 (1971). If anything is certain here, it is that a pardon that allows a person rifles and shotguns but not handguns neither 'plainly and unmistakably' nor 'expressly' provides that he may not possess firearms.

II. THE "ALL OR NOTHING" READING IS INCOMPATIBLE WITH CONGRESS'S MAIN GOAL IN ADOPTING THE PARDON/RIGHTS'-RESTORATION EXEMPTION AND ITS OTHER 1986 AMENDMENTS TO 18 U.S.C. § 921(a)(20): DEFERENCE TO STATE INTERESTS

The theme behind the changes Congress made to § 921(a)(20) when the pardon/rights'-restoration exemption was added to it was a desire to defer to state interests, a theme that "all or nothing" would undercut.

The pardon/rights-restoration exemption became law in 1986 as part of "FOPA," the Firearms Owners' Protection Act. Pub.L. No. 99-308, 100 Stat. 449.

Before FOPA's enactment, 18 U.S.C. § 921(a)(20) said:

> The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

(1985).

No study of legislative history is needed to discern Congress's primary goal in changing 921(a)(20): to defer substantially to state interests. *See, e.g., United States v. McLean*, 904 F.2d 216, 218 (4th Cir.), *cert. denied*, 498 U.S. 875 (1990) ("Congress intended 'deference to state law with respect to the federal firearms privileges of persons convicted in that state.' " (quoting *Cassidy*, 899 F.2d at 549)). The main changes FOPA made to § 921(a)(20) make Congress's goal clear.

1. FOPA added the sentence "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held," which overruled a decision of this Court that "[w]hether one has been 'convicted' within the language of the gun control statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the state." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111-112 (1983). In deferring to state definitions of 'conviction,' Congress concluded that state interests should prevail over this Court's warning that "a rule that would give effect to expunctions under varying state

statutes would seriously hamper effective enforcement . . . " and that "perplexing problems would confront those required to enforce federal gun control laws . . . " 460 U.S. at 121, 122. (The case involved an Iowa state "deferred judgment" that had been expunged.)

2. Subject to the "expressly provides" clause, FOPA gave states the power to exempt expunged, set-aside, and rights'-restored convictions from the reach of federal firearms law.

3. As for pardons, it confirmed states' ability to exempt pardoned individuals from the felon-in-possession law and shifted an important burden that had operated against exemptions. Before FOPA consolidated federal firearms' law in Title 18, both Title 18 and an Appendix to Title 18 had provisions restricting felons' access to firearms (*see* 18 U.S.C. §§ 922(g) and 922(h) (1985) and 18 U.S.C. App. § 1201-1203 (1985)), but only the provisions in the Appendix had a pardon exemption. 18 U.S.C. App. § 1203 (1985). At least one case had held that Title 18's failure to include a pardon provision made inoperable a provision in a pardon attempting to exempt the conviction from the felon-in-possession laws. *Thrall v. Wolfe*, 503 F.2d 313 (7th Cir. 1974). Moreover, the new § 921(a)(20), by presuming that a pardon exempted a conviction from counting under federal firearms law unless it expressly provided otherwise, reversed the contrary presumption in pre-FOPA law, which read:

> This title shall not apply to – . . . (2) any person who has been pardoned by the President of the United States or the chief executive of a State and has *expressly* been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

18 U.S.C. App. § 1203 (1985) (emphasis added).

4. FOPA deleted from clause (A) of § 921(a)(20), "as the Secretary may by regulation designate," thus taking away some additional power, albeit limited, from the federal government.

Thus the overall theme of FOPA's amendments to § 921(a)(20) is clear. Congress decided to accede in major respects to state interests, experience, and judgment in specifying to what extent criminal convictions were countable for purposes of federal law. In saying that the exemption should be read in a way that gives no respect to state pardons, rights'-restorations, and expungements that draw thoughtful lines between some firearms and others, the "all or nothing" reading is in outright conflict with this objective.

True, Congress did not revamp the felon-in-possession law to such an extent that it perfectly *mirrored* state law on what firearms a felon could possess, and where and when. Thus, *United States v. Indelicato*, 97 F.3d 627, 629-630 (1st Cir. 1996) (cited in the *Estrella* case, J.A. 67, 104 F.3d at 8, for this point) notes that "if a state does not restore a felon's civil rights but expressly allows him to possess firearms, the felon may still be prosecuted under the federal statute." *Indelicato*, 97 F.3d at 629-30. That Congress made pardon and rights'-restoration touchstones for states' exempting felons from the felon-in-possession law, however, in no way even *suggests* that the "expressly provides" clause means that a felon who is

pardoned or has rights restored must be given access to all guns or else none at all.

This Court has said that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971) (itself a case on federal firearms law). The main clause of the pardon/rights'-restoration exemption *cedes* power to the states – or, more precisely, it suspends the operation of federal law enforcement within part of an area, namely the area of firearms, that is subject to both federal and state enforcement. The "all or nothing" reading conflicts with the rule in *Bass* in that it views Congress, without clearly stating its purpose, as intending the "expressly provides" clause to give some enforcement power back to the federal government, thus altering the federal-state balance established by the exemption's main clause.

Legislative history that we have found on the "expressly provides" clause, though it does not consider the "all or nothing" question, clearly indicates how Congress would have answered the question. Explaining changes the Committee made to a FOPA precursor (S. 1030, 97th Cong., 1st Sess. (1981)) as originally introduced, a Senate Judiciary Committee Report says:

> The original language of S. 1030 provided that a person barred from gun ownership by a conviction would be relieved from that bar if he received a pardon or restoration of civil rights. The amended bill adds the exception that this will not apply if the pardon or restoration expressly provides that the recipient may not own firearms This allows *flexibility* should such a pardon or restoration be based upon considerations not relating to fitness to own a firearm.

S.Rep. 476, 97th Cong., 2d Sess. 12 (1982). In addition, an explanation of the changes to § 921(a)(20) in a later Senate Judiciary Committee Report includes this sentence:

> In the event that the official granting the pardon, restoration of rights, or expungement of record does not intend that it restore the right to firearm ownership, this provision honors that intent as expressly provided in the order or pardon.

S.Rep. 583, 98th Cong., 2d Sess. 7 (1984). The Committee's use of the word "flexibility" and the phrase "honor that intent" shows the desire to *accommodate* state interests, not to override them.

III. READING THE "EXPRESSLY PROVIDES" CLAUSE AS PERMITTING PARTIAL REINSTATEMENT OF FELONS' FIREARMS PRIVILEGES MAKES BETTER SENSE OF THE STATUTORY SCHEME

a. Avoiding Unfairness to the Felon who Relies Upon the Terms of a Pardon or Upon State Law

The "all or nothing" view, if correct, increases the chance of serious injustice occurring when a state permits felons, after pardon or rights'-restoration, to have some guns but not others. If a felon acquires a firearm in reliance upon a pardon or state law allowing him to have it, it would be grossly unfair to prosecute him as a felon in possession because the pardon or state law prevents him from having other firearms.

The *Estrella* case itself says that one of the "patent virtues" of the non-"all or nothing" view is that "it may provide better warning to the ex-felon *if* he remains in his state of conviction[.]" J.A. 66, 104 F.3d at 8 (emphasis in original). But *Estrella* then qualifies this statement, saying (1) that it is not clear that it is common for a defendant to remain in the state of original conviction and to honestly rely on state law and (2) that, in any event, the felon-in-possession statute does not require willfulness. J.A. 67, 104 F.3d at 8.

Moving to another state would rarely alleviate any notice problem, however. In the case of a pardon, the "all or nothing" reading could create a notice problem even if the person moved to another state. In the case of rights'-restoration, the notice problem created by the "all or nothing" reading would remain if the person, as a result of rights'-restoration in the state of conviction, was allowed some but not all firearms and then moved to another state where felons are permitted to possess (a) some of the same guns as permitted by the state of conviction or (b) all guns that non-felons may have.

Nor does the absence of a statutory willfulness element in § 922(g) bear on the policy issue. Compared with the usual ignorance-of-the-law situation, the risk of injustice is of a higher order when a state specifically legalizes conduct – and sometimes, as in Massachusetts, even grants a physical license to the person to engage in the conduct – that the federal government, unbeknownst to the person, forbids. *See* Mass. Gen. L. ch. 140, § 129B (allowing a felon not otherwise ineligible to receive the state license to possess and carry rifles and shotguns five years after conviction or release). Caron, in fact, had such

a license. *Caron*, 64 F.3d at 714. The "all or nothing" view, in fostering the opportunity for an innocent-minded felon to get trapped, decidedly undermines the statutory goal of "Firearms Owners' Protection."

(This is not to say that the view of the "expressly provides" clause allowing partial reinstatement of firearms privileges solves *all* notice problems. A Massachusetts felon who, soon after five years had elapsed after release from prison, obtained a rifle relying on a valid Massachusetts rifle/shotgun license, could be prosecuted federally because his civil right to serve on a jury is not restored until seven years after release.)

b. Avoiding the Irrationality of States' Having to Give Rights'-Restored Felons Access to the Most Dangerous Legal Firearms in Order to Allow Access to the Least Dangerous

A consequence of the "all or nothing" reading is that if a state wants at some point to allow felons to be able to have the least dangerous firearms, it must give them access to the most dangerous firearms that non-felons have access to. That result makes no sense. Rather, state authorities should be allowed to balance the important interests at stake: reinstatement of some felons' firearms rights vs. the public safety.

In balancing those interests, states have come up with different solutions, based on topography, population, traditions, and the like, including, possibly, actual experience with felons' access to firearms of varying types. But if "all or nothing" is correct, states that restore civil rights and wish to allow some felons to hunt or to

protect herds from predators must, against their possible better judgment, change their laws to make sure that those felons may have access to "Saturday night specials" if the states' non-felons do.

"It has long been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Sutherland Statutory Construction* § 45.12 (5th ed. 1992). For this reason alone, "all or nothing" should be rejected.

c. Ease of Administration

Estrella concedes that, as opposed to "all or nothing," the reading of the "expressly provides" clause that allows limited reinstatement of firearms privileges "is probably easier for courts to administer in the first instance (by asking what state law permits as to *this* weapon)." J.A. 66, 104 F.3d at 8 (emphasis in original). But *Estrella* later says:

> As for ease of administration, Congress in drafting the statute certainly did not have this value high on its list, and the ["all or nothing" approach] requires more work in the first case to assess the law of the state but less work in subsequent cases involving the same state.

J.A. 67, 104 F.3d at 8.

As *Estrella* suggests, deciding whether a state's law that allows the firearm at issue in a felon-in-possession case prohibits other firearms may involve a fair amount of work. One reason for this is that, as *Estrella* concedes,

there may be close cases where a state's restriction on felons' access to firearms is "arguably *de minimis*." *Id.* The federal court may thus not only have to *search* for state law limiting access to firearms not in issue in the case before it but, more important, *evaluate* whether or not such a limitation, if found, is substantial or merely *de minimis*. On the other hand, under the view permitting partial reinstatement of firearms privileges, a federal district court need, in cases where civil rights have been restored and state law arguably allows the possession of the firearm at issue in the felon-in-possession case, only concern itself with what state law actually says.

d. The Invalidity of the Trustworthiness Rationale

Although both the Sixth Circuit's *Driscoll* case and the *Estrella* case base their adoption of the "all or nothing" reading on their view of § 921(a)(20)'s literal meaning, they also put forward a policy argument in favor of the "all or nothing" reading. Thus, *Estrella* says:

> But requiring that the state permit the untrammeled possession of firearms is fully consistent with the trustworthiness rationale that underpins the "civil rights restored" provision itself.

J.A. 67; 104 F.3d at 8. *Driscoll* makes the same point. It says that if a state chooses to treat former felons "as full members of society, and refuses to place any limitations on their activities" and thus has "effectively vouched for its convicted felons, declaring them to be free of stigma,"

> Congress, in turn, has promised to respect the states' decisions, and has decided not to burden those whom the states have exonerated. Because

> of this interpretation of federal law, we reject the idea . . . that federal law prohibits convicted felons only from carrying such weapons as the state [sic] originally sentenced them would not allow them to carry. Under federal law, a person is either treated as a convicted felon, and thus prohibited from carrying any firearms, or is treated as though he had a clean record, and thus allowed to carry all legal firearms.

970 F.2d at 1480. *Estrella* and *Driscoll* say, in other words: (1) because the rights'-restoration exemption does not mirror state law as to whether the felon may have firearms, given that the state must first deem him a *trustworthy* person, by dint of pardon, rights'-restoration, etc., and (2) because a state has not found a person fully trustworthy if there are guns that non-felons may have but that he may not, then (3) allowing the felon to have some types of guns violates the law's rationale unless the felon is trustworthy enough to have all guns that non-felons may have.

(In an earlier case on the rights'-restoration clause, *United States v. Indelicato*, 97 F.3d 627 (1996), the First Circuit viewed trustworthiness as a less-than-perfect explanation of Congressional intent. "This 'trustworthiness' rationale is about the best that we or anyone else has managed to explain Congress's approach." *Id.* at 630.)

If *Driscoll* and *Estrella* are correct that Congress, in adopting the pardon/rights'-restoration exemption, wanted felons to have access to firearms only when the state had "refused to place any limitations on their activities" and "declared them to be free of stigma," then

Congress did a poor job of saying so. Were that Congress's goal, it could have said something like: "Any conviction because of which, by reason of pardon or otherwise, a person is not deemed by law any less trustworthy than otherwise shall not be considered a conviction for purposes of this chapter" – and in doing so have spared the world the hundreds of cases that the clause has engendered, including the present series of cases on the meaning of the "expressly provides" clause. 'Trustworthiness' might have been a rationale for another statute that another Congress wrote at another time, but it has no relation to the statute Congress in fact wrote.

In appealing to trustworthiness, *Estrella* and *Driscoll* overlook a key fact: that complete trustworthiness is *not* a precondition for exempting felons from the felon-in-possession law.

Restrictions on felons necessarily fall into three classes: restrictions on civil rights, *i.e.*, voting, public office, jury service; firearms' restrictions; and *other* restrictions, such as restrictions on employment. *Estrella* and *Driscoll* fail to consider that § 921(a)(20)'s rights'-restoration exemption applies to a felon who (1) has had the three civil rights restored, (2) is permitted access to all firearms by state law, but (3) is subject to other restrictions, perhaps severe, due to the past felony – restrictions that show he or she is not "free of stigma" and not a "full member of society." For example, a felony conviction may be an impediment to certain types of employment, is grounds in some states for divorce, may in some be a factor in terminating parental rights, and may, for certain offenses, require registration under sex-offender registration laws. *See, generally,* Kathleen M. Olivares, Velmer S.

Burton, Jr. & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60-SEP Fed. Probation 10 (1996). *See also Civil Disabilities of Convicted Felons, A State-by-State Survey* (Department of Justice loose-leaf book, October 1996). Convictions may, if within prescribed time limits, make credibility subject to impeachment in court proceedings. (In states following Fed. R. Evid. 609(e), even a pardon does not necessarily exempt one from impeachment.) Indeed, in at least one state, Michigan, one's civil rights are evidently restored when one leaves prison, even if one is on *parole*. *See United States v. Dahms*, 938 F.2d at 131, 132-133. Likewise, in Massachusetts one can be on parole for many years after the seven years required for rights'-restoration. *See* Mass. Gen. L. ch. 279, § 24 and ch. 127, § 133.

In sum, Congress is comfortable with allowing rights'-restored felons, even if still under severe restrictions, access to all firearms. It is irrational, then, to think that Congress would be *un*comfortable with allowing felons – ones perhaps no longer under other restrictions – to have only certain kinds of firearms on the ground that the state deems them insufficiently trustworthy to have all firearms available to non-felons.

The "trustworthiness rationale," moreover, suffers from circularity. Suppose Congress *had* wanted states, before a pardon or state law could exempt felons from the felon-in-possession law, to have first declared them fully trustworthy in all other areas. If the governor or state law had made such a declaration by eliminating all non-

firearms stigma and then, in deciding upon firearms privileges, decided not to allow the felon every lawful firearm, the governor or state would be in a Catch-22 situation were Congress to say that preventing access to some lawful firearms shows that the governor or state has thereby found him untrustworthy after all.

For each of these reasons, trustworthiness fails as a policy rationale to justify the "all or nothing" reading.

CONCLUSION

Petitioner requests that the judgment of the court of appeals in its case No. 96-2339 be reversed and that the judgment of the district court be affirmed in finding him not eligible for sentencing under the Armed Career Criminal Act. Petitioner requests that the order of the court of appeals in its case No. 96-2338 dismissing his appeal of the district court's upward departure be vacated and that the appeal be reinstated.

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